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No. 88-1445

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, *et al.*,
Petitioners,
v.
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT MNC FINANCIAL, INC.

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QUESTION PRESENTED

Whether the Court of Appeals properly deferred to the statutory interpretation of an administrative agency, in compliance with this Court's decision in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), after the Court had used traditional tools of statutory construction to attempt to discern Congress' intent on the precise question at issue and found the statute was ambiguous.

LIST OF PARENTS, SUBSIDIARIES, AND AFFILIATES OF RESPONDENT MNC FINANCIAL, INC.

Other than wholly-owned subsidiaries, Respondent MNC Financial, Inc. has no subsidiaries, and has no parents or affiliates.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent MNC Financial, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the District of Columbia Circuit's decision in this case.

STATEMENT OF THE CASE

Respondent MNC Financial, Inc. offers the following exceptions and clarifications to Petitioner's Statement of the Case.

The banking-law issue presented to the District of Columbia Circuit was whether the Federal Reserve Board correctly decided that an existing grandfathered insurance business operated by a bank holding company and one of its subsidiaries, pursuant to 12 U.S.C. § 1843(c)(8)(D), need not be terminated or divested simply because the stock of the bank holding company is acquired by another bank holding company. The *Sovran/MNC* court permitted the continued exercise of these Exemption D rights regardless of the change of ownership of the grandfathered entity.

The Court of Appeals understood its obligation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to apply the two-step analysis that requires a court to employ traditional tools of statutory construction to ascertain whether Congress had a clear intent on the precise question at issue before the court may defer to administrative construction of a statutory provision.

REASONS FOR DENYING THE WRIT

I. Contrary to Petitioners' Presentation Of The Decision Below, The Court Of Appeals Faithfully And Correctly Applied The *Chevron* Principles In Expressly Concluding That The Statute Was 'Ambiguous' And That The Agency's Interpretation Was Reasonable

The petition reflects a clearly erroneous reading of the Court of Appeals' decision. Petitioners claim that "the court of appeals improperly skipped over" the first step of the *Chevron* analysis. (Pet. at 7). The Court of Appeals, however, was clear and explicit in recognizing the two-step process and following it. As the majority stated:

> [The Court's] role in reviewing an agency's interpretation of a statute it administers is strictly confined. [1] We examine the language of the statute and, if necessary, the legislative history to determine

> whether Congress had a specific intent. If the agency's interpretation is inconsistent with Congress's clear intent, that interpretation is invalid. [2] Otherwise, we owe considerable deference to the agency, and we must uphold the agency's interpretation if reasonable."

(Pet. App. at 11a).

Petitioners erroneously state that "the majority found *no ambiguity*" in the statute. (Pet. at 8) (emphasis in original). While the dissenting judge found there was no ambiguity, the majority expressly concluded that it was faced with "competing acceptable interpretations of the words of the statute" (Pet. App. at 15a), and that "nothing in either the language or the structure of the statute, or in the legislative history, conclusively resolves this dispute." (Pet. App. at 16a). In upholding the agency's decision, the majority relied expressly on this Court's holding in *Young v. Community Nutrition Institute*, 476 U.S. 974, 980-81 (1986), that a statute can be "ambiguous" even where one of two plausible readings is the "more natural". (Pet. App. at 15a).

The majority opinion is clear: having found the statute ambiguous, the Court moved to "the second step of the *Chevron* inquiry" and found that the agency's interpretation was not unreasonable. (Pet. App. at 16a). Far from misconstruing this Court's guidance in *Chevron*, the Court of Appeals explicitly and faithfully followed it. Indeed, *Chevron* was the principal authority relied upon below.

Petitioners' argument is properly seen as a disagreement with the *application* of the *Chevron* principles to this case, rather than an argument that the Court of Appeals failed to follow the correct mode of analysis. The Petitioners take the dissenting judge's conclusion that the language was "devoid of ambiguity" (Pet. App. at 20a), erroneously attribute that same conclusion to the majority, and then fault the Court of Appeals for failing

to apply the *Chevron* analysis. However, it is clear that no such error occurred. Although Judge Buckley dissented from the majority opinion, he found no fault with the majority's analysis and he expressly recognized that if the majority were correct in concluding that the statute was ambiguous, then "the majority properly deferred to the agency's interpretation and reached an appropriate disposition of this case." (Pet. App. at 20a).

Properly analyzed, the issue presented is not whether the Court of Appeals misapprehended or misapplied *Chevron*, but whether that court correctly concluded that the statute was ambiguous and therefore deferred to the Board's interpretation.

II. The Court Of Appeals Correctly Concluded That The Statutory Provision In Issue Is Ambiguous

The statute in issue permits a bank holding company to engage in otherwise impermissible insurance activities, if that activity "was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982." Bank Holding Company Act, § 4(c)(8), 12 U.S.C. § 1843(c)(8). In this case Maryland National Corporation ("MNC"), a bank holding company, acquired American Security Corporation, another bank holding company which was, both directly and through a subsidiary, lawfully engaged in certain insurance activities on May 1, 1982. After the acquisition, American Security remains a separate subsidiary of MNC. Applying the statute literally, MNC can continue to engage in the insurance activities because the activities were "engaged in by . . . its subsidiary [ASC] on May 1, 1982."

Petitioners' "plain meaning" argument rests entirely on an assertion that, on the facts of this case, the reference in § 4(c)(8) to "the bank holding company" can only be a reference to "the *acquiring* bank holding" and cannot be construed to refer to "the *acquired* bank holding company." The majority of the court below initially

did conclude that it would prefer the Petitioners' construction to the agency's if it were faced with the question "in the first instance." (Pet. App. at 15a). However, when the Petitioners sought rehearing and advanced essentially the same argument presented here, the majority took the additional step of reviewing its decision and issuing an additional opinion in which they made it clear that "petitioners' reading of the statute may not even be the more natural interpretation of Congress' language." (Pet. App. at 56a).

Petitioners assert that the panel majority's opinion concurring in the denial of rehearing *en banc* is not a supplement to the original panel opinion and "has no relevance to this petition." (Pet. at 8, n.4). While we agree that the original panel opinion established the law of this case in the first instance, this Court can consider and decide for itself any impact the concurrence may have on the precedential value of the original opinion. *Washington Mobilization Committee v. Jefferson*, 617 F.2d 848, 858 n.5 (D.C. Cir. 1980). The concurring opinion is part of the decision in this case and the precedents for construing the Bank Holding Company Act and is persuasive of the validity of the majority's original decision.[1]

The Court of Appeals specifically considered the arguments advanced in the petition which also were advanced below on rehearing. In rejecting those arguments, the majority expressly concluded that "it is just as likely (perhaps more likely) strictly as a matter of word pars-

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[1] That the majority's concurrence in the denial of rehearing *en banc* is part of the law of the case is further supported by this Court's practice of looking to a state court's opinion, on denial of rehearing, to determine whether a federal question has been raised for jurisdictional purposes. For example, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1976), this Court held that its appellate jurisdiction was properly invoked based on the express holding of the state court, in denying rehearing, that "[a] majority of this court does not consider this statute to be in conflict with the First Amendment." In that case, the constitutional issue had not been presented prior to the petition for rehearing.

ing that Congress intended [the phrase "the bank holding company"] to refer [to] the target or acquired company." (Pet. App. at 56a). The majority also noted that inclusion in the statute of activities grandfathered because they were engaged in by "any of [the holding company's] subsidiaries" was "inconsistent with petitioners' reasoning." (Pet. App. at 57a). Rejecting Petitioners' "myopic focus" on a single word (Pet. App. 57a), the majority carefully considered both the specific language and the legislative history in reaching its conclusion that "[t]he statute does not explicitly deal with what happens to grandfather rights once the ownership of the entity holding the rights changes." (Pet. App. at 15a-16a).

We concur with the majority's conclusion on rehearing that the more likely "plain meaning" of the statute is one which supports the Board's ruling. It should be clear, however, that the Court of Appeals' conclusion that the statute was ambiguous is not erroneous and fully justifies proceeding to step two of the *Chevron* process.

III. The Court Of Appeals Correctly Deferred To The Administrative Agency's Established Construction Of The Statute Based On Its Prior Consistent Decisions

The decisions under review do not represent a novel or unprecedented agency interpretation of § 4(c)(8). The same interpretation had previously been applied by the agency in *BankAmerica Corporation*, 69 Fed. Res. Bull. 568 (1983), and *Fuji Bank, Limited*, 69 Fed. Res. Bull. 50 (1983), in which the Board also permitted a bank holding company to continue to engage in otherwise impermissible nonbanking activities through an acquired company that retained its separate corporate status. Both of those prior agency decisions were relied upon in this case to reach the same result. (Pet. App. at 39a-40a). These prior consistent decisions reinforce the reasonableness of the agency action under review in this case and reinforce the conclusion that the courts should defer to that decision.

It has long been accepted that an important factor to be considered in according weight to an agency's interpretation of a statute is its consistency with earlier and later pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Northern Colorado Water Conservancy District v. F.E.R.C.*, 730 F.2d 1509, 1519 (D.C. Cir. 1984). "[T]he construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time." *United States v. Clark*, 454 U.S. 555, 565 (1982). This is particularly true where Congress has not acted to overrule an agency's construction of legislation, as such inaction by Congress is evidence of the reasonableness of the agency's construction. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The present case is not one in which the agency's interpretation of a statutory provision conflicts with its earlier interpretation as in *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987), cited by Petitioners. Such interpretations are entitled to considerably less deference than a consistently held agency view. *Id.* But where, as here, the agency has consistently adhered to an interpretation of the statute it enforces, this interpretation is entitled to considerable weight. *International Brotherhood of Teamsters, Chauffeurs, Warehousers and Helpers of America v. Daniel*, 439 U.S. 551, 556 (1979). Thus, the Court of Appeals properly deferred to the Board's construction of § 4(c)(8) and correctly affirmed that construction as reasonable under *Chevron*.

IV. There Is No Confusion Among Other Circuits Warranting Review In This Case

Citing three recent decisions of the Second, Third and Fifth Circuit Courts of Appeals, Petitioners seek to create the impression that a conflict is present among the circuits in applying the *Chevron* analysis to review of

administrative determinations. Such conflict simply does not exist.

In *Puerto Rico Maritime Shipping Authority v. Valley Freight Systems*, 856 F.2d 546, 552 (3d Cir. 1988), the Third Circuit upheld an assertion of jurisdiction by the Interstate Commerce Commission which was based on the ICC's determination that motor carrier service solely within a marine terminal met the "on a public highway" requirement of the Interstate Commerce Act. Petitioners contend that the court in so holding incorrectly adopted the ICC's interpretation of the statute "without first finding that traditional tools of statutory construction failed to produce a clear meaning." (Pet. at 12). However, the court explicitly acknowledged its responsibility under *Chevron* and stated that

> [i]t is plain that Congress has not addresed the question of whether motor carrier service of the type at issue here is within ICC jurisdiction. This is hardly surprising in view of the extremely fact-specific nature of the problem. The sole inquiry, then, is whether the Commission acted reasonably in determining that the service meets the 'on a public highway' requirement of the Interstate Commerce Act. We conclude that it did.

Id. at 552.

Contrary to Petitioners' argument, the Second Circuit in *Lehman v. Burnley*, 866 F.2d 33 (2d Cir. 1989), properly applied the *Chevron* analysis in upholding the Secretary of Transportation's decision that "State amounts expended" as used in the Recreational Boating Safety Act (the "Act") does not encompass local government expenditures. The Court first determined that Congress had not spoken directly to the precise question at issue, as the Act itself contained no indication of congressional intent on what should be included in "State amounts expended" and no definition of "State". Having made that determination, the Court then examined other sections of the United States Code governing shipping and decided that the Sec-

retary's interpretation was based on a permissible construction of the Act. In so deciding, the Court stated:

> As indicated in section 13101(a), Congress' objective was to increase state participation in boating safety efforts. It chose language that may be read to include only state expended funds in its allocation formula. The Secretary has made a determination that the best way to achieve Congress' goal is through allocating the funds only to state governments. This determination is entitled to defense. The Supreme Court has noted that "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984). Here, New York is in effect challenging the soundness of the decision to exclude local expenditures. As noted above, the Secretary's policy is a reasonable one, and thus should be upheld.

Id. at 37.

Petitioners also attack the Fifth Circuit's decision in *Diamond Shamrock Exploration Corp. v. Hodel*, 853 F.2d 1159 (5th Cir. 1988), claiming that the court erroneously found a statute silent on the question of the collectability of royalties on take-or-pay payments made under natural gas contracts even though the court's analysis purportedly showed that the statute did address the issue. (Pet. at 13). However, this attack reflects Petitioners' apparent misunderstanding of that decision.

As noted by the court, the standard government oil and gas lease is issued pursuant to § 1337(b) of the Outer Continental Shelf Lands Act, which generally prescribes the terms of the lease. The lease itself requires the payment of royalty "in amount or value of production saved, removed or sold from the leased area", and provides that the Secretary of the Department of the Interior may establish "reasonable minimum values for purposes of com-

puting royalty" on gas obtained from the lease. Here, the Secretary construed the "reasonable minimum value" of natural gas sold, as that phrase is used in the lease (and not the statute), to include take-or-pay revenues.

Applying *Chevron*'s Step One, the court correctly found that § 1337(b) "does not even remotely address" the *precise* question at issue, namely, whether royalties may be collected on take-or-pay payments. *Id.* at 1165. The court then properly proceeded to Step Two to decide whether the Secretary's determination was based on a permissible construction of the statute. Examining the terms of the lease, as well as relevant regulations and statutes, the court held that it was not a permissible construction.

We submit that it is the Petitioners, and not other circuit courts of appeals, who are confused as to the proper application of the *Chevron* analysis. There is no conflict among the circuits requiring this Court to grant review in this case to explain its decision in *Chevron.*

CONCLUSION

The Court of Appeals correctly and faithfully followed the *Chevron* decision in deciding this case and reached the correct result in applying that decision to the facts of this case. There is no conflict among the circuits in following *Chevron.* The petition therefore should be denied.

Respectfully submitted,

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